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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

General Notice

19 CFR Part 142

APPLICATION TO RESTRICT PARALLEL IMPORTS BEARING GENUINE TRADEMARKS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of application to restrict parallel imports bearing genuine trademarks.

SUMMARY: This document seeks comments on an application submitted to prevent the importation of certain goods bearing genuine "Duracell" trademarks under the terms of a district court injunction requiring the U.S. Customs Service to provide protection to trademarks meeting certain criteria.

DATES: Comments must be received on or before September 3, 1992.

ADDRESSES: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., Room 2104, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Barry P. Miller, Senior Attorney, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., Room 2104, Washington, D.C. 20229 (202–927–0850).

SUPPLEMENTARY INFORMATION:

Background

On April 28, 1992, The United States District Court for the District of Columbia issued an amended order in *Lever Brothers Co. v. United States*, No. 86–3151 (HHG), which enjoined the U.S. Customs Service from allowing the importation of foreign-made goods otherwise admissible under 19 C.F.R. § 133.21(c)(2) that bear a trademark identical to a valid United States trademark but which are materially physically different. As a result of this court action and pending further action by a court or final resolution of *Lever Bros. Co. v. United States*, Appeal No. 92–5185, owners of recorded trademarks that are under common ownership or control with foreign companies that use the trademark on foreign-made goods with material physical differences can now apply to Customs to stop the importation of those foreign-made goods.

In order to receive the protection as outlined by the court, applicants must first show that the trademark owner requesting the protection falls within the scope of section 133.21(c)(2) of the Customs Regulations, as opposed to section 133.21(c)(1). The District Court for the District of Columbia ordered Customs to provide protection only when goods would otherwise be admissible under section 133.21(c)(2), which applies to goods of a foreign trademark owner under common ownership or control with the U.S. trademark owner. Section (c)(1) applies to goods of a foreign trademark owner that also owns the U.S. trademark.

Applicants for protection under the terms of the court order must also show Customs that the foreign affiliate of the U.S. trademark owner uses the mark on goods with material physical differences. For this, applicants must show Customs that the goods are different, and also that the difference is "material". On June 26, 1992, by publication in the Federal Register (57 FR 28605), Customs invited trademark owners to notify Customs if they believe that the trademark owner and the goods bearing the trademark meet these criteria.

An application has been submitted pursuant to the June 26, 1992, Federal Register notice, for a restriction against the importation of goods bearing genuine "Duracell" trademarks. Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person opposing the application. Notice of the action taken in response to the application will also be published in the Federal Register.

Dated: July 27, 1992.

BARRY P. MILLER,
Acting Chief,
Intellectual Property Rights Branch.

[Published in the Federal Register, August 4, 1992 (57 FR 34337)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 10

[RIN 1515 – AA84]

PROPOSED CUSTOMS REGULATIONS AMENDMENTS RELATING TO THE UNITED STATES-ISRAEL FREE TRADE AREA AGREEMENT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to implement the duty preference provisions of the Agreement which established the United States-Israel Free Trade Area.

DATES: Comments must be received on or before September 29, 1992.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to and inspected at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT:

Operational Aspects: Maritza Castro, Office of Trade Operations (202–566–2597).

Legal Aspects: Craig Walker, Office of Regulations and Rulings (202–566–2938).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On November 29, 1983, President Reagan and Israeli Prime Minister Shamir agreed to proceed with bilateral negotiations for the establishment of a U.S.-Israel free trade area which would eliminate tariffs and other trade-distorting practices between the two countries. Section 401 of the Trade and Tariff Act of 1984 (Public Law 98–573) amended section 102 of the Trade Act of 1974, 19 U.S.C. 2112, to authorize the President to enter into a bilateral trade agreement with Israel to establish a free trade area, subject to Congressional approval of implementing legislation. Section 402 of the 1984 Act, codified at 19 U.S.C. 2112 note, set forth specific country of origin and related criteria for any reduction or elimination of United States duties provided for in a trade agreement

with Israel, and subsection (c) thereof directed the Secretary of the Treasury to prescribe such regulations as may be necessary to carry out the provisions of that section, after consultation with the United States Trade Representative.

Negotiations for the U.S.-Israel free trade area were concluded on February 26, 1985, and, on April 22, 1985, representatives of the U.S. and Israeli Governments signed the Agreement on the Establishment of a Free Trade Area between the Government of the United States of America and the Government of Israel (hereinafter, "the Agreement"). Annex 1 of the Agreement sets forth the terms for immediate elimination or staged reduction of duties on products of Israel, with all products to become duty free on January 1, 1995. Annex 3 of the Agreement sets forth the rules of origin, including documentary requirements, which apply for purposes of free or reduced duty treatment under the Agreement.

On April 29, 1985, President Reagan sent a message to Congress transmitting the text of the Agreement, the text of a proposed United States-Israel Free Trade Area Implementation Act, and a proposed Statement of Administrative Action to implement the Agreement; the President's message and the materials transmitted therewith were reprinted as House Document 99–61, 99th Congress, 1st Session. On June 11, 1985, the United States-Israel Free Trade Area Implementation Act of 1985, Public Law 99–47, was enacted. Sections 3 and 4 of this Act, codified at 19 U.S.C. 2112 note, approved the Agreement and Statement of Administrative Action as submitted to Congress and authorized the President to proclaim tariff modifications necessary to carry out the schedule of duty reductions with respect to Israel set forth in Annex 1 of the Agreement; section 5(b), also codified at 19 U.S.C. 2112 note, mandated the promulgation of regulations necessary or appropriate to carry out actions proposed in the Statement of Administrative Action in order to implement the Agreement. On August 30, 1985, President Reagan signed Proclamation 5365 which, *inter alia*, modified the tariff schedules to carry out the duty reductions under the Agreement, effective for articles entered, or withdrawn from warehouse for consumption, on and after September 1, 1985. The rules of origin and regulatory authority provisions, as contained in section 402 of the 1984 Act and as set forth in Annex I of the Proclamation, are now set forth as General Note 3(c)(vi), Harmonized Tariff Schedule of the United States (HTSUS), and the specific duty treatment accorded to individual products under the Agreement is reflected throughout the HTSUS in the Special rate of duty subcolumn where the symbol "IL" appears in parentheses.

The U.S. Customs Service is responsible for the administration of laws and regulations regarding the entry of merchandise into the United States. Moreover, section III. B. of the Statement of Administrative Action submitted to Congress states that "Customs Service regulations will be amended to reflect the entry requirements for articles to be entered under the Agreement." Thus, the proposed regulations set forth

in this document are directed specifically to those portions of the Agreement which concern the rules of origin and related provisions governing the duty-free or reduced-duty treatment of products imported from Israel. These rules do not confer origin or establish a criterion for determining origin of imported goods for any other purpose. For example, origin determinations for country of origin marking purposes under 19 U.S.C. 1304 are not affected.

The basic rules of origin set forth in Annex 3 of the Agreement (which are derived from section 402 of the Trade and Tariff Act of 1984, *supra*) are based on section 213(a) of the Caribbean Basin Economic Recovery Act, as amended (19 U.S.C. 2703(a)), which contains the origin rules governing duty-free treatment under the Caribbean Basin Initiative (CBI). Thus, in order to be eligible for reduced or duty-free treatment under the Agreement, an article imported from Israel must meet three basic requirements: (1) it must be imported directly from Israel into the customs territory of the U.S., (2) it must have its origin in Israel, *i.e.*, it either must be wholly the growth, product, or manufacture of Israel or must be a new or different article of commerce that has been grown, produced, or manufactured in Israel, and (3) it must have a minimum domestic content, *i.e.*, at least 35 percent of its appraised value must be attributed to the cost or value of materials produced in Israel plus the direct costs of processing operations performed in Israel. Annex 3 of the Agreement further parallels the origin rules in the CBI statute and implementing regulations (19 CFR 10.191–10.198) in that (1) the definitions or explanations of "imported directly", "wholly the growth, product, or manufacture", "cost or value of materials", and "direct costs of processing operations" are essentially the same as those under the CBI, (2) the cost or value of U.S.-produced materials may be counted toward the Israeli domestic content requirement to a maximum of 15 percent of the appraised value of the imported article, and (3) simple combining or packaging operations or mere dilution with water or another substance will confer neither Israeli origin on an imported article nor Israeli or U.S. origin on a constituent material of an imported article.

Annex 3 of the Agreement sets forth documentary requirements to demonstrate compliance with the origin criteria, similar to the documentation used under the CBI and under the Generalized System of Preferences (GSP). Thus, the Agreement provides for submission of (1) a Certificate of Origin when the claim for duty-free or reduced-duty treatment is made and (2) a declaration setting forth the details (concerning the production or manufacture of the imported article) which were used to prepare the Certificate of Origin. Although the requirements for completion and submission of both documents are similar to those under the CBI and GSP, there are some differences which are discussed in the section-by-section discussion below.

In view of the similarity between the rules of origin under the Agreement and those under the CBI, the proposed regulations set forth in this

document are based in significant part on the CBI regulations. However, some variations have been made from the CBI approach, in some cases to reflect particular requirements under the Agreement and in other cases to simplify or otherwise improve on the layout of the CBI regulations. The proposed regulations are discussed in detail below.

SECTION-BY-SECTION DISCUSSION

Section 10.211 Scope.

This section sets forth a general statement of the purpose of the regulations with reference to the Agreement and the implementing legislation relating thereto. The section is modeled on section 10.301 of the United States-Canada Free Trade Agreement (CFTA) implementing regulations (19 CFR 10.301). As in the case of the CFTA regulation, the last sentence is merely intended to clarify that the regulations apply only for duty preference purposes under the Agreement and not for purposes of country of origin determinations under other laws and regulations. Application of U.S. rules of origin will ordinarily result in a finding of a single country of origin for all purposes under U.S. customs law. However, as U.S. courts have ruled, there might be situations in which U.S. law compels different results under different country-of-origin provisions because of the language of the particular statutes being applied. Accordingly, the last sentence of this section reflects the ordinary operation of U.S. customs law.

Section 10.212 Definitions.

This section sets forth definitions of terms that are used throughout the regulations under the Agreement.

Paragraph (a), which defines "Agreement", is self-explanatory.

Paragraph (b) is taken from Annex 3, paragraph 3, of the Agreement which was based on a similar provision in section 10.191(b)(3) of the CBI implementing regulations (19 CFR 10.191(b)(3)). Paragraph (b) is identical to the Agreement text except that reference is made to "Israel" rather than to a "Party" to reflect a U.S. import context.

Paragraph (c) reflects the standard definition of "entered" and is identical to the definition set forth in section 10.191(b)(4) of the CEI regulations (19 CFR 10.191(b)(4)).

Section 10.213 Eligibility criteria in general.

This section is modeled on the approach taken in section 10.302 of the CFTA implementing regulations (19 CFR 10.302) which makes a general reference to the requirements for preferential duty treatment with cross-references to the specific sections which set forth those requirements in detail. Customs believes that this general statement/cross-reference approach will facilitate the reader's overall understanding of the program and the requirements thereunder.

Section 10.214 Imported directly.

This section sets forth the "imported directly" requirement which is stated in Annex 3, paragraph 1(b), of the Agreement and which is de-

fined in Annex 3, paragraph 8, of the Agreement. The Agreement provisions are based on section 10.193 of the CBI regulations (19 CFR 10.193).

The opening sentence of this section is similar to the opening statement in the CBI regulation. Although the expression "customs territory of the U.S." does not appear in the Agreement, it is used in the CBI regulation and must be included here because it appears in section 402 of the Trade and Tariff Act of 1984, *supra*, and in General Note 3(c)(vi)(B)(2), HTSUS.

Paragraphs (a)–(c) of this section incorporate the following minor editorial deviations from the language contained in Annex 3, paragraph 8, of the Agreement: (1) use of "U.S." and "Israel", as appropriate, rather than "Party", (2) use of the past tense in some instances to reflect a U.S. import context, (3) addition of the words "while en route to the U.S." in paragraph (b) for the sake of clarity and to align on the corresponding CBI regulatory provision, and (4) replacement of the words "provided that" by "and" in paragraph (c)(2). In addition, paragraph (c) does not incorporate the fourth requirement of Annex 3, paragraph 8(c), of the Agreement (regarding compliance with the origin requirements under the Agreement). The Agreement provision was based on corresponding GSP and CBI regulatory provisions which were in effect when the Agreement was negotiated but which were subsequently deleted when the final CBI regulations were published (on the reasoning that the provision was redundant because goods must always meet the origin requirements in order to receive the duty preference under those programs). Customs believes that this Agreement provision is equally unnecessary in the present context and thus should not be included in this section.

None of the variances from the Agreement text discussed above constitutes a substantive departure from the terms of the Agreement. Since the Agreement text was based on the CBI regulations, this proposed section will be interpreted in a manner which is consistent with interpretations of the CBI regulatory provisions.

Section 10.215 Country of origin criteria.

This section sets forth the basic country of origin rules which apply under the Agreement. The Agreement rules were derived from the rules which apply under the CBI.

Paragraph (a) states the general rule that the article must be a product of Israel. Paragraph (a)(1), which refers to articles "wholly" the growth, product, or manufacture of Israel, is based on language in Annex 3, paragraph 1(a), of the Agreement. It is noted that the word "wholly" does not appear in the text of either section 402 of the 1984, Act or General Note 3(c)(vi)(B)(1), HTSUS. Customs believes that, as in the case of the CBI, the basic country of origin distinction must be between articles which are "wholly" the product of a country (in which case no change in country of origin has ever taken place) and articles which originated in one country and are later substantially transformed into a

product of a second country. Paragraph (a)(2) states the substantial transformation rule and reflects language contained in Annex 3, paragraphs 1(a) and 4, of the Agreement. With the exception of the words "having a new name, character, or use", the language is identical to the wording in the U.S. implementing legislation. The reference to a new name, character, or use is taken from Annex 3, paragraph 4, of the Agreement (which defines "country of origin" for purposes of the Agreement) and merely reflects the traditional test used to determine whether a new or different article has been created.

Paragraph (b) sets forth the simple combining or packaging or mere dilution exceptions contained in Annex 3, paragraph 2, of the Agreement and in the U.S. implementing legislation. The parenthetical expression "as opposed to complex or meaningful" in paragraph (b)(1) is intended for clarification only and is based on an identical reference in section 10.195(a)(1) of the CBI regulations (19 CFR 10.195(a)(1)). In order to avoid unnecessary repetition, and in consideration of the fact that these exceptions were taken directly from the CBI origin rules, the last sentence of this paragraph simply makes a cross-reference to the CBI regulatory provision which explains the exceptions in detail.

Section 10.216 Value content requirement.

This section sets forth the provisions which relate to the 35 percent value content requirement under the Agreement. In addition to a statement of the basic requirement, it contains provisions which are almost identical to sections 10.196 and 10.197 of the CBI regulations (19 CFR 10.196 and 10.197).

Paragraph (a) sets forth the basic requirement as contained in Annex 3, paragraph 1(c), of the Agreement and in the implementing legislation.

Paragraph (b) concerns the cost or value of materials countable toward the 35 percent requirement and is based on provisions contained in the Agreement, in the implementing legislation and in section 10.196 of the CBI regulations.

Paragraph (b)(1) defines "materials produced in Israel" in a manner similar to the approach in section 10.196(a) of the CBI regulations. Paragraph (b)(1)(ii) was specifically drafted to reflect (1) the application of the simple combining or packaging or mere dilution language to materials as provided in Annex 3, paragraph 2, of the Agreement and (2) the country of origin language which also applies to materials under Annex 3, paragraph 4, of the Agreement. The last sentence of paragraph (b)(1) cross-references to the useful examples contained in CBI section 10.196(a), and the words "except where the context otherwise requires" are intended to alert the reader to the fact that some aspects of those examples apply only in a CBI context.

Paragraph (b)(2) concerns the inclusion of U.S.-produced materials up to 15 percent of appraised value, as provided for in Annex 3, paragraph 5, of the Agreement and in the implementing legislation. The regulatory language is similar to CBI section 10.195(c), refers to materi-

als produced "in the customs territory of the U.S." to align on the implementing legislation language, and provides that the origin rules applicable to Israeli materials also apply to such U.S. materials as stated in the Agreement.

Paragraph (b)(3) is taken directly from CBI section 10.196(b).

Paragraph (b)(4) sets forth the elements includable under the cost or value of materials as provided in Annex 3, paragraph 6, of the Agreement, which was based on section 10.196(c) of the CBI regulations. This paragraph refers to both Israeli and U.S. materials (to which the same rules must apply), and the last sentence reflects Agreement language taken directly from the last sentence of the CBI regulation.

Paragraph (c) sets forth provisions regarding direct costs of processing operations under the 35 percent requirement, as contained in Annex 3, paragraph 7, of the Agreement (essentially identical to section 10.197 of the CBI regulations, the format of which is followed here). Although the implementing legislation also covers this aspect of the Agreement, the Agreement text is followed here because it is more complete and is consistent with the legislative intent.

Paragraph (d), which states the presumption of compliance with the 35 percent requirement in the case of articles wholly produced in Israel, is based on section 10.195(d) of the CBI regulations.

Section 10.217 Procedures for filing duty preference claim and submitting supporting documentation.

This section is intended to cover all procedural requirements, including the submission of supporting documentation, under the Agreement. Customs believes that discussion of all procedural aspects, after the sections dealing with legal requirements, is an improvement over the organization found in the CBI regulations and will facilitate understanding and application of the regulations under the Agreement.

Paragraph (a), which concerns the procedure for filing a claim for a preference, is based on CBI section 10.192 but does not contain the first sentence of the CBI provision which Customs believes is redundant and thus unnecessary. The exception language at the beginning of the first sentence is intended to reflect the fact that those procedures do not apply in the case of an informal entry.

Paragraph (b), which sets forth documentary requirements under formal entry procedures, contains the Certificate of Origin and declaration requirements contained in Annex 3, paragraph 9, of the Agreement which was modeled on the requirements set forth in CBI section 10.198.

Paragraph (b)(1) discusses the Certificate of Origin and is based on CBI section 10.198(a)(1). It differs from the CBI provision principally (1) by making reference to a dual use (GSP/Agreement) Certificate to reflect the layout of the document reproduced as Attachment II to Annex 3 of the Agreement, and (2) by inclusion of the last two sentences which reflect the requirements for completing boxes 11 and 12 on the Certificate as adopted for use under the Agreement.

Paragraph (b)(2) concerns duplicate Certificates of Origin and is taken directly from CBI section 10.198(a)(3).

Paragraph (b)(3) concerns waiver of the Certificate of Origin, which is provided for in the Agreement. It combines CBI section 10.198(a)(4) with CBI section 10.198(a)(2) but without any reference to the bonding procedure contained in the latter CBI provision. The absence of a bonding provision is based on a policy decision taken by Customs, reflected in Customs Directive 3550–27 dated September 8, 1987, to reduce paperwork by requiring neither a bond for production of a missing document (such as the Certificate of Origin) nor actual submission of the missing document unless Customs specifically makes a request for it in writing. In order to be consistent with this Customs policy and with the Agreement which refers to only submission or waiver of the Certificate of Origin, this subparagraph states that, where the Certificate is not submitted with the entry summary, it is deemed to be waived unless Customs requests it in writing.

Paragraph (b)(4) concerns the supporting declaration and is based on CBI sections 10.198(c)(1) and (2). Although the Agreement does not specifically limit use of the declaration to cases involving articles not wholly the growth, product, or manufacture of Israel, Customs believes this limitation should apply for the same reason that it has applied under the CBI. Paragraph (b)(4)(i) essentially follows CBI section 10.198(c)(1) except that the wording of the declaration itself reflects the specific elements of information required under Annex 3, paragraph 9, of the Agreement that are not required under the CBI (in particular, separate listings of materials wholly produced in Israel or the U.S. and of materials which retained third country origin). Paragraph (b)(4)(ii) is taken from CBI section 10.198(c)(2) without change.

Paragraph (c), which concerns informal entries, is based on CBI section 10.198(b) but also clarifies the fact that the procedures for filing claims in formal entry situations do not apply to informal entries.

Paragraph (d) concerns evidence of direct shipment and is based on CBI section 10.194. However, the last sentence of CBI section 10.194(a) has been omitted because it is covered by paragraph (e) discussed below.

Paragraph (e) concerns verification of documentation and is based on CBI section 10.198(d), but it refers to all documentation submitted under the section rather than only to evidence of country of origin.

COMMENTS

Before adopting the proposed amendments, consideration will be given to any written comments (preferably in triplicate) timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Customs Service Headquarters, Room 2119, 1301 Constitution Avenue, NW., Washington, D.C.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12291

Because no notice of proposed rulemaking is required pursuant to 5 U.S.C. 552(a)(1), the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and E.O. 12291 do not apply. The economic impact of the United States-Israel Free Trade Area, which these proposed amendments would implement, flows from the Agreement and authorizing legislation with which these proposed amendments are merely in conformity.

PAPERWORK REDUCTION ACT

The collection of information requirements contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the collection of information should be sent to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503. A copy should also be sent to Customs at the address set forth previously.

The collection of information in these proposed regulations is in Section 10.217. This information is required by Customs under the Agreement and pursuant to General Note 3(c)(vi)(E), HTSUS, and is used to determine whether imported merchandise meets the eligibility criteria for duty-free or reduced-duty treatment under the Agreement. The likely respondents are business organizations including importers, exporters and manufacturers.

Estimated total annual reporting and/or recordkeeping burden: 14,406 hours.

The estimated average annual burden per respondent/recordkeeping is .2616 hours.

Estimated number of respondents and/or recordkeepers: 5550.

Estimated annual frequency of responses: 8.92.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 10

Customs duties and inspections, Imports, Israeli Products.

PROPOSED AMENDMENTS TO THE REGULATIONS

It is proposed to amend Part 10, Customs Regulations (19 CFR Part 10), as set forth below:

PART – 10 ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The authority citation for part 10 is amended by adding authority for §§ 10.211–10.217 to read as follows:

Authority: 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1508, 1623, 1624;

* * * * * * *

§§ 10.211–10.217 also issued under 19 U.S.C. 2112 note.

2. Part 10 is amended by adding a new center heading followed by new sections 10.211 through 10.217 to read as follows:

UNITED STATES-ISRAEL FREE TRADE AREA AGREEMENT

Section

UNITED STATES-ISRAEL FREE TRADE AREA AGREEMENT

§ 10.211 Scope.

The provisions of §§ 10.212–10.217 relate to the eligibility criteria and procedures for obtaining duty preferences for goods imported from Israel and designated for such preferences in General Note 3(c), Harmonized Tariff Schedule of the United States (HTSUS), and in the "special" rate of duty column of the HTSUS. These preferences were the subject of the Agreement on the Establishment of a Free Trade Area between the Government of the United States of America and the Government of Israel, entered into on April 22, 1985, and approved under the United States-Israel Free Trade Area Implementation Act of 1985 (99 Stat. 82). In situations involving country of origin determinations for imported goods subject to bilateral restrictions or prohibitions or country of origin marking requirements under other provisions of law, other criteria for determining origin may be applicable.

§ 10.212 Definitions.

The following definitions apply for the purposes of §§ 10.213 through 10.217:

(a) *Agreement*. "Agreement" means the Agreement on the Establishment of a Free Trade Area between the Government of the United States of America and the Government of Israel, entered into on April 22, 1985.

(b) *Wholly the growth, product, or manufacture of Israel*. "Wholly the growth, product, or manufacture of Israel" refers both to any article which has been entirely grown, produced, or manufactured in Israel and to all materials incorporated in an article which have been entirely grown, produced, or manufactured in Israel, as distinguished from articles or materials imported into Israel from another country, whether or not such articles or materials were substantially transformed into new or different articles of commerce after their importation into Israel.

(c) *Entered.* "Entered" means entered, or withdrawn from warehouse for consumption, in the customs territory of the U.S.

§ 10.213 Eligibility criteria in general.

Articles classifiable under an HTSUS heading or subheading for which the symbol "IL" appears in the "special" column are eligible for a preference if each of the following requirements is met:

(a) *Imported directly.* The articles are imported directly from Israel is provided in § 10.214.

(b) *Country of origin criteria.* The articles comply with the country of origin criteria set forth in § 10.215.

(c) *Value content requirement.* The articles comply with the value content requirement set forth in § 10.216.

(d) *Filing of claim and submission of supporting documentation.* The claim for the preference is filed, and the documentation in support of the claim is submitted, in accordance with the procedures set forth in § 10.217.

§ 10.214 Imported directly.

In order to be eligible for a preference under the Agreement, an article shall be imported directly from Israel into the customs territory of the U.S. For purposes of this requirement, the words "imported directly" mean:

(a) Direct shipment from Israel to the U.S. without passing through the territory of any intermediate country; or

(b) If shipment was through the territory of an intermediate country, the articles in the shipment did not enter into the commerce of any intermediate country while en route to the U.S., and the invoices, bills of lading, and other shipping documents show the U.S. as the final destination; or

(c) If shipment was through an intermediate country and the invoices and other documents do not show the U.S. as the final destination, then the articles in the shipment, upon arrival in the U.S., are imported directly only if they:

(1) Remained under the control of the customs authority in the in intermediate country;

(2) Did not enter into the commerce of the intermediate country except for the purpose of a sale other than at retail, and the articles are imported into the U.S. as a result of the original commercial transaction between the importer and the producer or the latter's sales agent; and

(3) Have not been subjected to operations other than loading and unloading, and other activities necessary to preserve the articles in good condition.

§ 10.215 Country of origin criteria.

(a) *General.* An article may be eligible for a preference under the Agreement only if the article is either:

(1) Wholly the growth, product, or manufacture of Israel, or

(2) A new or different article of commerce having a new name, character, or use, that has been grown, produced, or manufactured in Israel.

(b) *Exceptions.* No article shall be considered a new or different article of commerce for purposes of the Agreement by virtue of having merely undergone:

(1) Simple (as opposed to complex or meaningful) combining or packaging operations, or

(2) Mere dilution with water or mere dilution with another substance that does not materially alter the characteristics of the article.

The principles and examples set forth in § 10.195(a)(2) shall apply equally for purposes of this paragraph.

§ 10.216 Value content requirement.

(a) *General.* An article may be eligible for a preference under the Agreement only if the sum of the cost or value of the materials produced in Israel, plus the direct costs of processing operations performed in Israel, is not less than 35 percent of the appraised value of the article at the time it is entered.

(b) *Cost or value of materials.*

(1) *"Materials produced in Israel" defined.* For purposes of paragraph (a) of this section, the words "materials produced in Israel" refer to those materials incorporated in an article which are either:

(i) Wholly the growth, product, or manufacture of Israel; or

(ii) Subject to the exceptions set forth in § 10.215(b), substantially transformed in Israel into a new or different article of commerce having a new name, character, or use, which is then used in Israel in the production or manufacture of a new or different article imported into the U.S.

Except where the context otherwise requires, the examples set forth in § 10.196(a) shall apply for purposes of paragraph (b)(1) of this section.

(2) *Materials produced in the U.S.* For purposes of determining the percentage referred to in paragraph (a) of this section, an amount not to exceed 15 percent of the appraised value of the article may be attributed to the cost or value of materials produced in the customs territory of the U.S. The provisions of paragraph (b)(1) of this section shall apply for purposes of determining whether materials were produced in the customs territory of the U.S.

(3) *Questionable origin.* When the origin of a material either is not ascertainable or is not satisfactorily demonstrated to the appropriate district director, the material shall not be considered to have been grown, produced, or manufactured in Israel or in the customs territory of the U.S.

(4) *Determination of cost or value of materials.*

(i) The cost or value of materials produced in Israel or in the customs territory of the U.S. includes:

(A) The manufacturer's actual cost for the materials;

(B) When not included in the manufacturer's actual cost for the materials, the freight, insurance, packing, and all other costs incurred in transporting the materials to the manufacturer's plant;

(C) The actual cost of waste or spoilage (material list), less the value of recoverable scrap; and

(D) Taxes and/or duties imposed on the materials by Israel or the U.S., provided they are not remitted upon exportation.

(ii) Where a material is provided to the manufacturer without charge, or at less than fair market value, its cost or value shall be determined by computing the sum of:

(A) All expenses incurred in the growth, production, or manufacture of the material, including general expenses;

(B) An amount for profit; and

(C) Freight, insurance, packing, and all other costs incurred in transporting the material to the manufacturer's plant.

If the pertinent information needed to compute the cost or value of a material is not available, the appraising officer may ascertain or estimate the value thereof using all reasonable ways and means at his disposal.

(c) *Direct costs of processing operations.*

(1) *Items included.* For purposes of paragraph (a) of this section, the phrase "direct costs of processing operations" means those costs directly incurred in and/or which can be reasonably allocated to, the growth, production, manufacture, or assembly of the specific article under consideration. Such costs include, but are not limited to the following, to the extent that they are includable in the appraised value of the imported article:

(i) All actual labor costs involved in the growth, production, manufacture, or assembly of the specific article, including fringe benefits, on-the-job training, and the cost of engineering, supervisory, quality control, and similar personnel;

(ii) Dies, molds, tooling, and depreciation on machinery and equipment which are allocable to the specific article;

(iii) Research, development, design, engineering, and blueprint costs insofar as they are allocable to the specific article; and

(iv) Costs of inspecting and testing the specific article.

(2) *Items not included.* For purposes of paragraph (a) of this section, the phrase "direct costs of processing operations" does not include items which are not directly attributable to the article under consideration or are not costs of manufacturing the product. These include, but are not limited to:

(i) Profit; and

(ii) General expenses of doing business which either are not allocable to the specific article or are not related to the growth, production, manufacture, or assembly of the article, such as administrative salaries, casualty and liability insurance, advertising, and salesmen's salaries, commissions, or expenses.

(d) *Articles wholly the growth, product, or manufacture of Israel.* Any article which is wholly the growth, product, or manufacture of Israel, including articles produced or manufactured in Israel exclusively from materials which are wholly the growth, product, or manufacture of Israel, shall normally be presumed to meet the requirement set forth in paragraph (a) of this section.

§ 10.217 Procedures for filing duty preference claim and submitting supporting documentation.

(a) *Filing claim for duty preference.* Except as provided in paragraph (c) of this section, a claim for a duty preference under the Agreement may be made at the time of filing the entry summary by placing the symbol "IL" as a prefix to the HTSUS subheading number applicable to each article for which the preference is claimed on that document. If the duty preference is claimed subsequent to the time of filing the entry summary but before liquidation becomes final, the filing of the Certificate of Origin or declaration, as described in paragraph (b) of this section, shall constitute the written claim.

(b) *Shipments covered by a formal entry.*

(1) *Certificate of Origin.* Except as provided in paragraph (b)(3) of this section, the importer or consignee or other appropriate party having knowledge of the relevant facts regarding a shipment of merchandise covered by a formal entry, for which a duty preference is claimed under the Agreement, shall file with the district director with the entry summary, as evidence of compliance with the country of origin and value content requirements, a Certificate of Origin Form A adopted for use under the Generalized System of Preferences (GSP) but modified for dual use either under the GSP or under the Agreement. The Certificate of Origin shall be properly completed, with the declaration in box 12 signed in Israel by the exporter or other authorized party having knowledge of the facts to which the declaration relates. The certification in box 11 shall not be used when the Certificate of Origin is to be filed for purposes of a duty preference under the Agreement.

(2) *Duplicate Certificate of Origin.* In the event of the loss, theft, or destruction of a Certificate of Original the district director shall accept a duplicate Certificate of Origin endorsed with the word "duplicate" in box 4. The duplicate shall bear the date of issue of the original Certificate of Origin and will be effective from that date.

(3) *Waiver of Certificate of Origin.* The district director may waive production of a Certificate of Origin when he is otherwise satisfied that the merchandise qualifies for a duty preference under the Agreement. If a properly completed Certificate of Origin is not filed with the entry summary, the entry shall nevertheless be accepted and production of the Certificate of Origin shall be deemed to be waived, unless the district director makes a written request for its production.

(4) *Articles not wholly the growth, product, or manufacture of Israel.*

(i) *Declaration.* In a case involving an article covered by a formal entry which is not wholly the growth, product, or manufacture of Israel, the

party which prepared and signed the Certificate of Origin in Israel shall be prepared to submit directly to the district director, upon request, a declaration setting forth all pertinent detailed information, concerning the production or manufacture of the article, which was relied upon in the preparation of the Certificate of Origin. When requested by the district director, the declaration shall be prepared in substantially the following form:

DECLARATION

I, _____ (name), hereby declare that the articles described below (a) were produced or manufactured in Israel by means of processing operations performed in Israel as set forth below, (b) incorporate materials wholly the growth, product or manufacture of Israel or of the customs territory of the United States as set forth below, (c) incorporate materials from the third countries identified below which became the growth, product, or manufacture of Israel or of the custom territory of the United States by means of the processing operations as set forth below, and/or (d) incorporate materials which are the growth, product, or manufacture of third countries as set forth below:

Numbers or marks of packages, invoices, bills of lading	Description of article and quantity	Processing operations performed on article in Israel		Material produced in Israel, the U.S. or third country	
		Description of processing operations	Direct costs of processing operations	Description of material, country of production and production process	Cost or value of material

Date _____

Address _____

Signature _____

Title _____

(ii) *Retention of records and submission of declaration.* The information necessary for the preparation of the declaration shall be retained in the files of the party which prepared and signed the Certificate of Origin for a period of 5 years. In the event that the district director requests submission of the declaration during the 5-year period, it shall be submitted by the appropriate party directly to the district director within 60 days of the date of the request or such additional period as the district director may allow for good cause shown. Failure to submit the declaration in a timely fashion will result in a denial of preferential duty treatment under the Agreement.

(c) *Shipments covered by an informal entry.* The normal procedure for filing a claim for preferential duty treatment as set forth in paragraph (a) of this section need not be followed in a case involving a shipment covered by an informal entry, and the filing of a Certificate of Origin is

not required for such a shipment. However, the district director may require submission of other evidence of entitlement to preferential duty treatment, and the filing of a Certificate of Origin may be required in a case involving consolidation of individual shipments under § 143.22 of this chapter.

(d) *Evidence of direct importation.*

(1) *Submission.* The district director may require that appropriate shipping papers, invoices, or other documents be submitted within 60 days of the date of entry as evidence that the articles were "imported directly", as that term is defined in § 10.214.

(2) *Waiver.* The district director may waive the submission of evidence of direct importation when otherwise satisfied, taking into consideration the kind and value of the merchandise, that the merchandise was, in fact, imported directly and that it otherwise clearly qualifies for preferential duty treatment under the Agreement.

(e) *Verification of documentation.* The documentation submitted under this section to demonstrate compliance with the requirements for preferential duty treatment under the Agreement shall be subject to such verification as the district director deems necessary. In the event that the district director is prevented from obtaining the necessary verification, the district director may treat the entry as fully dutiable.

CAROL HALLETT,
Commissioner of Customs.

Approved: July 1, 1992.

PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 31, 1992 (57 FR 33909)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Judges

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R. Kenton Musgrave
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James L. Watson

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Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 92–113)

RHP BEARINGS, RHP BEARINGS INC., AND UNITED PRECISION INDUSTRIES, LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 91–08–00560

Plaintiffs move pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record alleging that the Department of Commerce, International Trade Administration ("ITA"), committed two clerical errors in its calculation of RHP Bearings ("RHP") dumping margins for the first administrative review of the dumping order covering ball bearings and cylindrical roller bearings from the United Kingdom.

Held: The case is remanded to the ITA to determine the reliability of RHP's purchase price terms of sale data for cylindrical roller bearings. If the ITA finds RHP's data reliable, it will apply the percentage adjustment to RHP's purchase price CIF sales of cylindrical roller bearings for U.S. duty and U.S. brokerage and handling. If the data is unreliable, no correction will be made. In addition, this action will be remanded to the ITA to conduct a similar investigation as to RHP's purchase price terms of sale for ball bearings and to correct a clerical error in line 741 of the computer program for plaintiffs' ESP ball bearing sales upon remand or final decision by this Court in *Federal-Mogul Corp. v. United States*, No. 91–07–00528 (July 25, 1991).

[Plaintiffs' motion for judgment on the agency record granted in part and denied in part; action remanded.]

(Dated July 17, 1992)

Covington & Burling (*Harvey M. Applebaum, David R. Grace* and *Thomas O. Barnett*) for plaintiffs.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*); of counsel: *Dean A. Pinkert*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., William A. Fennell, Wesley K. Caine, Myron A. Brilliant*, and *Amy S. Dwyer*) for defendant-intervenor The Torrington Company.

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson, J. Eric Nissley, Joseph A. Perna, V* and *Larry Hampel*) for defendant-intervenor Federal-Mogul Corporation.

OPINION

TSOUCALAS, *Judge*: Plaintiffs, RHP Bearings, RHP Bearings, Inc. and United Precision Industries, Ltd. (collectively "RHP"), move pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record and remand of this proceeding to the Department of Commerce, International Trade Administration ("ITA"), for correction of two alleged

clerical errors in regard to the dumping margins calculated for RHP for the first administrative review of the dumping order covering ball bearings and cylindrical roller bearings from the United Kingdom. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the United Kingdom; Final Results of Antidumping Duty Administrative Reviews* ("Final Results"), 56 Fed. Reg. 31,769 (1991).

BACKGROUND

On June 11, 1990, the ITA initiated administrative reviews for imports of antifriction bearings from the United Kingdom. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom Initiation of Antidumping Administrative Reviews*, 55 Fed. Reg. 23,575 (1990). RHP participated fully in this proceeding. Administrative Record ("AR") Pub. Doc. 13.

In June 1991, the ITA disclosed to interested parties its proposed computer programming instructions for calculating dumping margins in this review. ITA afforded interested parties the opportunity to review these programming instructions and to point out any clerical errors contained in them prior to their use to calculate final dumping margins in this review. RHP participated in this process. AR Pub. Doc. 321.

Upon review of the ITA's programming instructions for the calculation of RHP's dumping margins, RHP discovered one alleged error. The error related to the programming instructions for the treatment of U.S. duty and U.S. brokerage and handling charges for purchase price sales of ball bearings and cylindrical roller bearings for which RHP paid movement costs (hereinafter "CIF sales"). In its response to the ITA's request for terms of sale information, RHP had coded purchase price CIF sales as "5", purchase price sales where RHP did not pay movement charges (hereinafter "FOB sales") as "3", and purchase price ex-works sales as "4". AR Pub. Doc. 105 at 59–60.

ITA determined that U.S. duty and U.S. brokerage and handling charges had not been reported for RHP's purchase price CIF sales and decided to apply a percentage adjustment to account for these charges. Due to the alleged programming error, the ITA applied this adjustment to all purchase price sales instead of only to purchase price CIF sales.

On June 10, 1991, RHP filed comments with the ITA identifying the alleged computer programming error and suggesting ways to correct the error. AR Pub. Doc. 321. RHP suggested that the ITA apply the percentage adjustment where RHP reported freight and insurance costs, which should correspond to CIF sales. *Id.* ITA failed to make the requested correction.

After the ITA issued the Final Results, RHP discovered that line 741 of the computer program for ESP ball bearing sales, provided to plaintiffs at a July 3, 1991 disclosure conference, read:

IF '01OCT89'D LE SALEDTE LE '31DEC99'D THEN DO

when in fact the line should have read:

IF '01OCT89'D LE SALEDTE LE '31DEC89'D THEN DO

so as to cover a three month period of review rather than a ten year period of review. RHP brought this clerical error to the attention of the ITA. Letter from Covington & Burling to Secretary of Commerce of 7/11/91. ITA also failed to correct this alleged error.

DISCUSSION

The Court's jurisdiction over this matter is derived from 28 U.S.C. § 1581(c) (1988).[1]

A final determination by the ITA in an administrative proceeding will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988). Under this standard, the ITA is granted considerable deference "in both its interpretation of its statutory mandate and the methods it employs in administering the antidumping law." *Chemical Prods. Corp. v. United States*, 10 CIT 626, 628, 645 F. Supp. 289, 291, *remand order vacated*, 10 CIT 819, 651 F. Supp. 1449 (1986) (citations omitted).

This Court has also stated "that fair and accurate determinations are fundamental to the proper administration of our dumping laws" and that "courts have uniformly authorized the correction of any clerical errors which would affect the accuracy of a determination." *Koyo Seiko Co. v. United States*, 14 CIT ___, ___, 746 F. Supp. 1108, 1110 (1990); *see e.g., Daewoo Elecs. Co. v. United States*, 13 CIT 253, 279–80, 712 F. Supp. 931, 954 (1989); *Asociacion Colombiana de Exportadores v. United States*, 13 CIT 13, 28, 704 F. Supp. 1114, 1126 (1989); *Serampore Indus., Pvt. Ltd. v. United States Dep't of Commerce*, 12 CIT 825, 834, 696 F. Supp. 665, 673 (1988); *Gilmore Steel Corp. v. United States*, 7 CIT 219, 223–24, 585 F. Supp. 670, 674 (1984); *Atlantic Sugar, Ltd. v. United States*, 1 CIT 211, 511 F. Supp. 819 (1981).

1. *Timing of remand:*

ITA believes that, to the extent the Court decides to remand the issues presented in this case, a remand in regard to cylindrical roller bearings is timely, but a remand for ball bearings should await the resolution of *Federal-Mogul Corp. v. United States*, No. 91–07–00528 (filed July 25, 1991). *Defendant's Memorandum In Partial Opposition To Plaintiffs' Motion For Judgment On The Agency Record* (Defendant's Memorandum) at 2–3.

[1] 28 U.S.C. § 1581(c) provides in pertinent part:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

In *Federal-Mogul* this Court issued a preliminary injunction enjoining liquidation of all ball bearings covered by the contested Final Results, including RHP's. *Federal-Mogul Corp.*, No. 91–07–00528 (Aug. 9, 1991) (order granting preliminary injunction). ITA argues that since RHP's ball bearings are subject to this preliminary injunction, and since recalculation of dumping margins is both expensive and time consuming, this Court should refrain from remanding any issues in regard to RHP's ball bearings until the Court issues a remand or a final decision in *Federal-Mogul*. *Defendant's Memorandum* at 2–4.

The Court agrees and will remand only those issues regarding cylindrical roller bearings at this time. The remand required in regard to ball bearings will occur when a remand or final decision is issued by this Court in *Federal-Mogul Corp.*, No. 91–07–00528.

2. *U.S. duty and U.S. brokerage and handling fees:*

ITA agrees with RHP's contention that the ITA's application of a percentage adjustment for U.S. duty and U.S. brokerage and handling to all of RHP's purchase price sales of ball bearings and cylindrical roller bearings was error and requests this Court to remand this issue back to the ITA at the proper time. *Defendant's Memorandum* at 1–4.

Defendant-intervenors The Torrington Company ("Torrington") and Federal-Mogul Corporation ("Federal-Mogul") oppose RHP's motion for a remand on this issue. Torrington and Federal-Mogul argue that the correlation of RHP's listing of freight and insurance charges with purchase price CIF sales is contradictory and unreliable. Torrington and Federal-Mogul point out instances in RHP's sample computer printouts for purchase price sales of ball bearings where terms of sale are coded as "5" (i.e. CIF sales) with no freight or insurance charges listed. *Response Of The Torrington Company, Intervenor, To Motion Of RHP Bearings, Et Al., For Judgment Upon The Agency Record* ("Torrington's Memorandum") at 4–5; *Federal-Mogul Corporation's Opposition To Plaintiffs' Motion For Judgment Upon The Agency Record* ("Federal-Mogul's Memorandum") at 3–8. RHP responds that these are instances of credit notes and therefore no movement expenses would be reported. *Plaintiffs' Reply To Defendant-Intervenors' Memorandum In Opposition To Plaintiff's Motion For Judgment Upon The Agency Record* ("RHP's Reply to Defendant-intervenors") at 3–4. The Court agrees with RHP. *See* AR Pub. Doc. 105 at 34; AR Pub. Doc. 176.

However, Torrington goes on to point out a further problem with RHP's listing of terms of sale for purchase price ball bearing sales, one which this Court finds troubling. The last three transactions on page 130 of the sample printouts filed by RHP contain a "7" in the terms of sale field along with no movement charges. *Torrington's Memorandum* at 5; AR Pub. Doc. 176. Nowhere is the entry "7" for terms of sale explained in RHP's submissions during the administrative proceeding. In its reply brief RHP states, in a footnote, that these three transactions were *correctly coded,* were FOB sales and therefore did not have any movement charges associated with them. *RHP's Reply to Defendant-in-*

tervenors at 4 n.4. However, according to RHP's own explanation of its coding of terms of sale, FOB sales were coded "3" not "7". AR Pub. Doc. 105 at 59–60.

In addition, this Court's examination of RHP's sample computer printouts for purchase price sales of cylindrical roller bearings also shows an instance where the terms of sale is coded as "7", as well as instances where terms of sale are coded "1" and "6". AR Pub. Doc. 176. None of these entries are explained by RHP in its submissions before the ITA or this Court.

The Court finds that RHP's failure to adequately explain the instances where purchase price terms of sale were coded "1", "6" or "7", even though the issue was raised by Torrington in its brief in regard to purchase price ball bearings sales, makes all of RHP's terms of sale data suspect.

Therefore, the Court remands this issue for the ITA to examine RHP's purchase price terms of sale data for cylindrical roller bearings to determine if that data is a reliable indicator of when RHP shipped cylindrical roller bearings CIF. If the ITA finds the data reliable, it will correct its Final Results by applying the percentage adjustment for U.S. duty and U.S. brokerage and handling only to RHP's cylindrical roller bearings purchase price CIF sales. If the ITA finds the data unreliable, no correction will be made. The same procedure will apply to RHP's purchase price ball bearing sales when this issue is remanded at a time and for a period to be determined by this Court's decision in *Federal-Mogul Corp.*, No. 91–07–00528.

3. *Computer line error:*

All parties agree that the error in computer line 741 for RHP's ESP ball bearing sales is a clerical error which should be corrected. Therefore this issue will be remanded back to the ITA to substitute '31DEC89'D for '31DEC99'D in line 741 at a time and for a period to be determined by this Court's decision in *Federal-Mogul Corp.*, No. 91–07–00528.

(Slip Op. 92–114)

FORMER EMPLOYEES OF JOHNSON CONTROLS, INC., AUTOMOTIVE SYSTEM GROUP, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 91–10–00764

Plaintiffs who produced prototypes for automotive seating challenge Labor's denial to certify them for trade adjustment assistance.

Held: The record supports the Labor's findings that the company does not import prototypes for automotive seating and the plant closure was due to the company's business deci-

sion to relocate the production of prototypes to where the automotive seating are mass-produced. The denial of certification is affirmed.

[Judgment for defendant.]

(Decided July 17, 1992)

George W. Wingerd, pro se for plaintiffs.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Vanessa P. Sciarra*), *Gary Bernstecker*, U.S. Department of Labor, of counsel, for defendant.

MEMORANDUM OPINION

DICARLO, *Chief Judge*: Plaintiffs, former employees of Johnson Controls, Inc., Automotive Systems Group, challenge the Department of Labor's denial of certification for trade adjustment assistance benefits under 19 U.S.C. § 2273 (1988). *See Johnson Controls, Inc. Automotive Systems Group, Eligibility to Apply for Worker Adjustment Assistance*, 56 Fed. Reg. 37,725 (1991) (neg. determination). The court has jurisdiction pursuant to 19 U.S.C. § 2395 (1988) and 28 U.S.C. § 1581(d)(1) (1988). The court holds that Labor's denial of the certification for trade adjustment assistance is supported by substantial evidence.

Plaintiffs produced metal back and seat frame prototypes for automotive seating at Automotive Systems Group, in Adrian, Michigan. Their petition for trade adjustment assistance was denied because Labor found that neither the company nor its parent company imported such prototypes. In addition, the prototype production was consolidated into other facilities due to economic conditions within the automotive industry and customer pressure to produce prototype parts using production processes which were not available at Adrian. After the denial of plaintiffs' request for administrative reconsideration, 56 Fed. Reg. 48,585 (1991), George Wingerd filed a letter with this court requesting a judicial review, which the Clerk of the Court deemed a summons and complaint. After this action was commenced, plaintiffs obtained counsel who withdrew from the case, and Mr. Wingerd appears *pro se*.

To qualify for trade adjustment assistance, a petitioning worker must prove, among other things:

> that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2272(a)(3) (1988). "To qualify for benefits, the statute requires a causal nexus between increased import penetration and the workers'[ ] separation. A causal nexus exists where there is a direct and substantial relationship between increased imports and a decline in sales and production." *Former Employees of Health-Tex, Inc. v. United States Secretary of Labor*, 14 CIT ____, ____, Slip Op. 90–80, at 2 (CIT, August 27, 1990) (citations omitted).

Labor's determination that the causation requirement was not satisfied is supported by substantial evidence. In the questionnaire response,

the company stated neither it nor its parent company imported any prototypes of automotive seating and has no plan for importation in the future. C.R. 20. It also stated that the plant closure was the result of a business decision to consolidate production of metal seat back prototypes into the plants where complete automotive seats are mass-produced. C.R. 22. This reason was confirmed by Labor in a telephone conversation with a personnel manager of the company after the petitioners requested administrative reconsideration. C.R. 39. The record further indicates the company's Division Manager of Employee Relations also gave the same reason to a local newspaper when the company announced the closure of the Adrian plant. R. 3. Since Labor's determination is supported by substantial evidence, the court affirms Labor's denial for certification of trade adjustment assistance.

Mr. Wingerd challenges Labor's finding by stating in his reply brief that UAW advised him the production of prototypes has not been transferred to Vincennes, Indiana, one of the locations where the company stated it would be transferred. However, in the absence of importation of the product, R. 9 & C.R. 20, plaintiff has no basis to assert that the closure of the Adrian plant was a result of the increased imports. Mr. Wingerd's allegation does not provide sufficient basis to require a remand to Labor.

Plaintiffs also allege that the impact of the increase of imported cars should have been examined by Labor in its determination. However, as Mr. Wingerd concedes in his brief the precedent clearly states that "a component, which is adversely impacted by increased imports of a finished article incorporating that component, cannot be like or directly competitive with the finished product." *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, Local 834 v. Donovan*, 8 CIT 13, 20, 592 F. Supp. 673, 678 (1984). Here, the merchandise plaintiffs produced were not components, but prototypes of components. Increases in the importation of finished cars would not provide the basis for trade adjustment assistance to plaintiffs.

This action is dismissed.

(Slip Op. 92–115)

MANIFATTURA EMMEPI S.P.A., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 90–06–00275

OPINION AND ORDER

[Plaintiff's motion for judgment upon the agency record granted in part and denied in part; remanded to the International Trade Administration.]

(Decided July 20, 1992)

Siegel, Mandell & Davidson, P.C. (*Brian S. Goldstein* and *David Newman*) for the plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, U.S. Department of Justice, Civil Division (*Velta A. Melnbrencis*); and Counsel for Import Administration, U.S. Department of Commerce (*D. Michael Kaye*), of counsel, for the defendant.

AQUILINO, *Judge:* In this action, the plaintiff has interposed a motion for judgment upon the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Final Results of Antidumping Duty Administrative Review; Spun Acrylic Yarn From Italy*, 55 Fed. Reg. 18,925 (May 7, 1990), accompanied by a form of order postulating, among other things, that the determination "is unlawful and of no effect". The gravamen of the motion is that it was not in accordance with law for the ITA to have refused to accept questionnaire responses and to have relied in lieu thereof on a ten-year-old cash deposit rate as best information otherwise available.

Jurisdiction of the court is pursuant to 19 U.S.C. § 1516 a(a)(2)(B)(i) and 28 U.S.C. § 1581(c).

I

Shortly after publication of the Treasury Department's *Spun Acrylic Yarn From Italy; Antidumping Withholding of Appraisement Notice and Determination of Sales at Less Than Fair Value*, 44 Fed. Reg. 75,547 (Dec. 20, 1979), the Trade Agreements Act of 1979 transferred responsibility for antidumping and countervailing duties to the ITA, which published an antidumping-duty order based on the foregoing determination at 45 Fed. Reg. 23,684 (April 8, 1980).

The plaintiff was not party to Treasury's investigation. It began exporting spun acrylic yarn from Italy to the United States in 1986, at which time the cash-deposit rate for exporters not involved in prior proceedings was 4.92 percent. In May 1988, the ITA published notice of initiation of an administrative review of its order for the period April 1, 1987 to March 31, 1988. In a letter to the agency on June 24, 1988, Emmepi acknowledged receipt of a questionnaire and requested an extension of time to respond until 15 days after the results of the ITA's review of the preceding period April 1986–March 1987 were made available. In a follow-up letter, counsel indicated that the requested extension would make responses due on August 15th. *See* Record Document ("R.Doc") 8. Another letter requested 15 additional days, or until August 30th. *See* R.Doc 15. On August 24, 1988, the ITA granted a 15-day extension but warned that "[any undue delays or lack of response would] result in [its] proceeding with appraisements based on the best information available." R.Doc 17. No date was specified then by the agency, although in the final results at bar the ITA states it to have been September 8, 1988. *See* 55 Fed. Reg. at 18,926.

The claim now is that the agency did not receive responses to its questionnaire for the 1987–88 review period or any other communication from Emmepi during the next seven months. Defendant's Memorandum, pp. 5–6. On its part, the plaintiff contends that on September 1,

1988 it requested another extension to file responses. *See* Plaintiff's Memorandum, p. 7. The plaintiff also refers to letters dated September 30th and March 20, 1989 stating that responses had not yet been filed because it was still awaiting the results of the 1986–87 review. *See* R.Doc 84. The September 30 letter claimed that Emmepi had been advised that those results would be available within a few months, but 14 had gone by and the company still had not learned of them. The ITA was requested to

> (1) expedite the dissemination of the results of the review, (2) exclude Manifattura Emmepi, S.p.A. pursuant to 19 C.F.R. 353.45 from any determination, (3) revoke any and all Antidumping Duty Findings or Orders with respect to [it] pursuant to 19 C.F.R. 353.54(b) and (4) cease to include [it] in any further administrative reviews.

Id. The March 1989 follow-up letter again requested the results of the 1986–87 review and represented that "millions of dollars of business [we]re being lost * * * as a result of * * * inability to quote prices [as to] whether additional duty w[ould] be payable and, if levied, at what rate." The letter requested a meeting to discuss the matter.

One took place on April 5, 1989 at which questionnaire responses for 1987–88 were finally submitted. The ITA rejected them as untimely. On April 25, 1989, the agency published *Spun Acrylic Yarn From Italy: Preliminary Results of Antidumping Duty Administrative Review* for 1986–87, 54 Fed. Reg. 17,803, and on October 13, 1989 the final results for that period were published, confirming the zero percent margin for Emmepi in the preliminary determination.[1]

On December 29, 1989, the preliminary determination for the subsequent review periods, April 1, 1987 to March 31, 1988 and April 1, 1988 to March 31, 1989[2], was published in which Emmepi's dumping margin was set at 48.05 percent *ad valorem* based on best information available. The company requested that the ITA reconsider and modify the determination based on its questionnaire responses. *See* R.Doc 84. The agency's response was publication on May 7, 1990 of the final results now at issue. They confirmed the 48.05% margin for Emmepi as well as for two other firms, one which no longer existed and one which had supplied inadequate questionnaire responses. The ITA confirmed that it used the cash deposit rate published in 1980 as best information available and stated that it had not considered Emmepi's responses to the questionnaire because they were untimely, notwithstanding grant of an extension.

The plaintiff now argues that the ITA's equation of the 1980 rate with best information available was "completely unjustifiable and unreasonable", deviated from agency practice, violated the Administrative Procedure Act and injured plaintiff's right to due process. In addition, the

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[1] *See Spun Acrylic Yarn From Italy; Final Results of Antidumping Duty Administrative Review*, 54 Fed.Reg. 42,005, corrected, 54 Fed. Reg. 45,891 (Oct. 31, 1989).

[2] After initiation in May 1988 of the administrative review for 1987–88 and before its completion, a similar review for the next year commenced. The record now indicates that Emmepi did not export subject merchandise during that 1988–89 period.

plaintiff claims the ITA neglected to consider whether its merchandise should be excluded from the scope of the antidumping-duty order.

II

The defendant counters that the plaintiff did not exhaust administrative remedies on these issues and that this court therefore should not address them. Defendant's Memorandum, pp. 12–14. Among other points, the plaintiff replies that the defendant has waived any right to press this position, which has not been pleaded as an affirmative defense.

CIT Rule 8(d), which is analogous to Rule 8(c) of the Federal Rules of Civil Procedure, requires a party to plead its affirmative defenses. The Court of International Trade has held that failure to do so results in waiver of such defenses and their exclusion from an action. See, e.g., *United States v. Atkinson*, 6 CIT 257, 259, 575 F.Supp. 791, 793 (1983), and cases cited therein. See also *Hall v. U.S. Postal Service*, 857 F.2d 1073 (6th Cir. 1988); *Little v. United States*, 794 F.2d 484, 487 n. 2 (9th Cir. 1986) ("exhaustion of administrative remedies * * * must be pleaded in the trial court"). In fact, in this action the defendant had more than one opportunity to so plead; plaintiff's complaint was amended twice, and the defendant interposed two answers. Since neither includes as an affirmative defense the point sought to be pressed now, it cannot foreclose consideration of plaintiff's motion.[3]

III

With regard to the issue of best information available, the record shows that the agency was lax in disposing of the requests for extensions of time, but this did not amount to license not to respond to the questionnaire or to justification of submission some seven months after the deadline. When information requested for an administrative review is not forthcoming, the government will rely on best information otherwise available. The Trade Agreements Act states that, in

> making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

19 U.S.C. § 1677e(c). Section 1677f(e) provides that data

> shall be submitted to the administering authority or the Commission during the course of a proceeding on a timely basis and shall be subject to comment by other parties within such reasonable time as

[3] Moreover, the court notes in passing that, in an action such as this, it does have discretion to proceed even when administrative remedies have not been exhausted. *See* 28 U.S.C. § 2637 (d); *Koyo Seiko Co. v. United States*, 15 CIT ___, ___, 768 F.Supp. 832, 835 (1991), *aff'd*, ___ F.2d ___ (Fed.Cir. June 30, 1992); *N.A.R., S.p.A. v. United States*, 14 CIT ___, ___ 741 F.Supp. 936, 944 (1990); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 346–47, 685 F.Supp. 1252, 1255–56 (1988); *Timken Co. v. United States*, 10 CIT 86, 92–93, 630 F.Supp. 1327, 1334 (1986). Indeed, there are numerous circumstances under which an appellate court may proceed without administrative remedies having been exhausted. See *generally McCarthy v. Madigan*, 112 S.Ct. 1081 (1992), and cases cited therein.

> the administering authority or the Commission shall provide. If information is submitted without an adequate opportunity for other parties to comment thereon, the administering authority or the Commission may return the information to the party submitting it and not consider it.

This statute has been enforced by the ITA and upheld in court. *See, e.g., Zenith Electronics Corp. v. United States,* 14 CIT ____, ____, 755 F.Supp. 397, 414 (1990); *Seattle Marine Fishing Supply Co. v. United States,* 12 CIT 60, 68–71, 679 F.Supp. 1119, 1126–28 (1988), *aff'd,* 883 F.2d 1027 (Fed. Cir. 1989); *Ansaldo Componenti, S.p.A. v. United States,* 10 CIT 28, 36–37, 628 F.Supp. 198, 204–05 (1986), citing *Atlantic Sugar, Ltd. v. United States,* 744 F.2d 1556 (Fed.Cir. 1984), and *UST, Inc. v. United States,* 9 CIT 352 (1985). On the other hand, the agency does have discretion to accept late submissions, but it is not required to do so, and deadlines generally have been sustained. *Cf. Brother Industries, Ltd. v. United States,* 15 CIT ____, ____, 771 F.Supp. 374, 383–84 (1991).

If the record indicated lack of adequate warning or of sufficient time in which to respond, resort to best information available would, at least arguably, have been inappropriate. *See, e.g., Daewoo Electronics Co. v. United States,* 13 CIT 253, 266–67, 712 F.Supp. 931, 944–45 (1989). However, it is clear that, in the absence of extension(s) from the ITA, Emmepi should have heeded the warning in the August 24, 1988 letter and responded. While that letter granted the company 15 more days to do so, even the most liberal interpretation thereof could not have stretched them into 1989.[4]

IV

The plaintiff also complains that use of the 1980 rate as the best information otherwise available was without foundation. It suggests several other rates as more relevant reflections of the pricing of the subject merchandise, reliance on which would have been more in keeping with ITA policy and practice.[5] The plaintiff points out the investigation conducted by Treasury was limited to one sale by one company and that the cost information and foreign-market value provided by the petitioner was used for adjustment purposes. *See* Plaintiff's Memorandum, pp. 19–20. In contrast, there was "full-fledged" review of companies' exporting of the merchandise during subsequent years. Any one, the plaintiff posits, would reflect the best information otherwise available. Finally, the plaintiff contends that it was unjust to revert to 1980 in view of the changes in the trade law since then.

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[4] In its first letter to the ITA, Emmepi had asked for an extension until after publication of the results for the administrative review of the preceding year. However, there was little basis for granting such an extension; answers to a questionnaire for one review period generally should not depend on the results of a prior review. Whatever the uncertainties on the part of foreign exporters, they do not excuse untimely responses to agency requests for information.

[5] The plaintiff suggests that the agency could have used rates calculated for other respondents during the administrative reviews conducted for the years 1981 to 1985, or the actual figures for Emmepi or other exporters for the 1986–87 review.

On its part, the defendant emphasizes that it selects best information available on a case-by-case basis. Defendant's Memorandum, pp. 19, 26. Here, after

> considering the zero percent margin calculated for plaintiff during the 1986–1987 review, the highest (14.06 percent) margin calculated during the 1986–1987 review for the other parties, and the margin from the LTFV investigation, Commerce reasonably determined that the latter rate was the only dumping rate that would not reward plaintiff for its consistent pattern of unresponsive behavior.

Id. at 20.

The court's role is not to determine whether the information chosen was the "best" actually available. Rather, the court must affirm the ITA's choice if supported by substantial evidence on the record and otherwise in accordance with law. *E.g., N.A.R., S.p.A. v. United States*, 14 CIT at ___, 741 F.Supp. at 942, citing *Chinsung Indus. Co. v. United States*, 13 CIT 103, 106, 705 F.Supp. 598, 601 (1989). That is, the ITA has wide latitude to determine what constitutes best information otherwise available, and its approach generally has been one of adverse inference. Presuming that an unresponsive exporter may be hoping for a more favorable margin by not supplying complete, accurate and timely information, the ITA has tended to use information which is least favorable to that exporter[6], including data supplied by a petitioning domestic competitor[7]. In *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190–91 (Fed.Cir. 1990), its most recent affirmative discussion of this approach[8], the court of appeals stated:

> We believe a permissible interpretation of the best information statute allows the agency to make such a presumption and that the presumption is not "punitive." Rather, it reflects a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced *current* information showing the margin to be less. The agency's approach fairly places the burden of production on the importer, which has in its possession the information capable of rebutting the agency's inference.

Footnote omitted; emphasis in original. In sum, the best-information rule has developed into a "club over recalcitrant parties or persons" who

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[6] In *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 526, 527, 717 F.Supp. 834, 836 (1989), *aff'd*, 901 F.2d 1089 (Fed.Cir.), *cert. denied sub nom. Floramerica, S.A. v. United States*, 111 S.Ct. 136 (1990), for example, the ITA defended its use of a punitive rate, stating that "its newly articulated policy is to use the highest rate available for noncooperative parties." *See also Chinsung Indus. Co. v. United States*, 13 CIT 103, 105, 705 F.Supp. 598, 601 (1989) ("The administrative practice of Commerce in deciding when to use the best information available seems to indicate that where the failure to submit adequate information has been seen as deliberate by the ITA, [it] has apparently heavily favored using alternative 'best information available' least favorable to a respondent").

[7] *See, e.g., Pistachio Group of the Ass'n of Food Indus., Inc. v. United States*, 11 CIT 668, 671 F.Supp. 31 (1987). In *Asociacion Colombiana de Exportadores de Flores, supra*, on the other hand, the court remanded to the ITA, stating that it could not use the petitioner's rate merely because it was the highest where that use would affect future importers. The plaintiff urges this court to view the latter decision as dispositive on the issue of whether or not the ITA can rely on the highest rate available for noncomplying respondents "where that rate can have application beyond that for those respondents." Plaintiff's Memorandum, p. 24.

[8] *Cf. Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565 (Fed. Cir. 1990).

fail to cooperate with ITA original investigations or subsequent administrative reviews. *Atlantic Sugar, Ltd. v. United States*, 744 F.2d at 1560.

This is not to say, however, that the ITA can choose information out of context. Its authority to select best information otherwise available is subject to a rational relationship between data chosen and the matter to which they are to apply. It is this nexus which the plaintiff argues is lacking herein, pointing out that, in every case cited by the defendant in support of the proposition that the original deposit rate was the best information available, a relationship existed between agency, law, time, and/or parties. Here, it contends, "there was *no* unity of parties, *no* unity of timeframes, *no* unity of the administrative agencies involved and *no* unity of law." Plaintiff's Reply Memorandum, p. 17 (emphasis in original).

In actions contesting the agency's choice of best information available in lieu of questionnaire responses, the court must determine whether or not that choice is relevant to the circumstances of the complainants. Indeed, the agency's stated policy has been to choose as best information otherwise available either the highest rate calculated for a responding party or the rate previously calculated for that party when unresponsive.[9] This is not to say that the ITA has not or may not use the rate developed during an original investigation as best information available, particularly when a party was involved in that proceeding.[10] However, in this action, the plaintiff was not 80 involved, nor was it an exporter of the subject merchandise at that time. Rather, the record shows that it became an exporter to the United States years later and that it provided timely information for its first, resultant administrative review[11] and then awaited the results thereof, which ultimately were determined to be zero.

On this record, if "deference is not abdication and 'rational basis scrutiny' is still scrutiny"[12], the court must grant plaintiff's motion for judgment to the extent that its complaint about choice of best information otherwise available is remanded to the ITA for reconsideration and redetermination of the margin of dumping, if any, of plaintiff's mer-

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[9] In *Titanium Sponge From Japan; Final Results of Antidumping Duty Administrative Review*, 55 Fed.Reg. 42,227 (Oct. 18, 1990), for example, the ITA stated that, where it has resorted to best information available after non- or inadequate response by a party, it is

> departmental practice to base BIA on the higher of the company's own previous rate or the highest rate calculated for a responding firm in the current review.

See also Florex v. United States, 13 CIT 28, 33, 705 F.Supp. 582, 589 (1989) ("It is ITA's standard practice to assign the highest margin determined for any of the respondents to non-responding, or verification failing, producers"); *Seattle Marine Fishing Supply Co. v. United States*, 12 CIT 60, 679 F.Supp. 1119 (1988), *aff'd*, 883 F.2d 1027 (Fed.Cir. 1989); *Uddeholm Corp. v. United States*, 11 CIT 969, 676 F.Supp. 1234 (1987).

[10] For example, in *Tai Yang Metal Indus. Co. v. United States*, 13 CIT 345, 712 F.Supp. 973 (1989), the court held that the ITA could lawfully use the margin found for the plaintiff in the underlying investigation as the best information available. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed.Cir. 1990). *Cf. Smith Corona Corporation v. United States*, 16 CIT Slip Op. 92–104 (July 10, 1992). The defendant cites administrative reviews to the same effect. *See* Defendant's Memorandum, p. 23 n. 19. However, in each of them, the party against which that rate was being applied participated in, or was exporting to the United States at the time of, the original investigation.

[11] If, as the defendant now contends, there was a "consistent pattern of unresponsive behavior" on the part of the plaintiff, the court has been unable to discern it from the record at hand.

[12] *Nordlinger v. Hahn*, 60 U.S.L.W. 4563, 4571 (June 18, 1992) (Stevens, J., dissenting).

chandise during the review periods April 1, 1987 to March 31, 1989. The agency may have 60 days from the date hereof for such redetermination and to report the results thereof to the court, whereupon the plaintiff may have 30 days thereafter in which to respond, and the defendant may have 15 days to reply thereto.

V

The court has carefully considered each of plaintiff's other points and finds them not to warrant discussion or affirmative relief. Thus, in all other respects, plaintiff's motion for judgment on the agency record must be, and it hereby is, denied.

(Slip Op. 92–116)

MERCADO JUAREZ/DOS GRINGOS AND DON BOWDEN, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 91–10–00768 (BN)

AMENDED OPINION AND ORDER

Appearances:
Porter, Wright, Morris & Arthur (*Leslie Alan Glick,* Esq.), for plaintiffs.
Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, Department of Justice (*Barbara M. Epstein*, Esq.), for defendant.

(Decided July 22, 1992)

[Defendant's motion to dismiss granted in part.]

NEWMAN, *Senior Judge:* This action raises the issue of the proper tariff classification and rate of duty under the Harmonized Tariff Schedules of the United States for plaintiffs' importations of avocado pulp entered at Laredo, Texas on various dates in 1990. In conformance with 19 U.S.C. § 1514(a), plaintiffs filed administrative protests against the liquidations of the entries, and pursuant to 19 U.S.C. § 1515 such protests were denied by the District Director by notices of July 30, 1991 and September 11, 1991. Following 28 U.S.C. §§ 2631 and 2632(b) plaintiffs filed a summons on October 24, 1991 contesting denial of their protests and predicate the court's jurisdiction on 28 U.S.C. § 1581(a).

Defendant moves to dismiss the action for lack of jurisdiction pursuant to CIT Rule 12(b)(1) and 28 U.S.C. 2637(a) on the ground that all liquidated duties and interest charges were not paid in full prior to the filing of the summons on October 24, 1991. Hence, asserts defendant, a jurisdictional prerequisite is lacking for judicial review of the classification and rate of duty assessed on the importations. *See Penrod Drilling*

Co. v. United States, 13 CIT 1005, 727 F. Supp. 1463 (1989), *reh'g. denied,* ____ CIT ____, 740 F. Supp. 858 (1990), *aff'd,* 925 F.2d 406 (Fed. Cir. 1991).

Plaintiffs concede that they did not pay the full amount of duties and interest owing on all of the entries listed in their summons until October 28, 1991 – four days after the filing of the summons – but nonetheless oppose dismissal for lack of jurisdiction. Citing *Eddietron, Inc. v. United States,* 84 Cust. Ct. 158, C.D. 4853, 493 F. Supp. 585 (1980), plaintiffs point up that on September 26 and October 1, 1991 – well in advance of the filing of the summons – in good faith they paid more than $28,000 for all of the duties and interest they believed were due and owing on the entries; and consequently, the court should exercise its equitable powers and credit as full payment all of the duties and interest paid prior to filing the summons to 23 out of 26 of the entries, and take jurisdiction of this action to that extent.

The court must agree with defendant's position that due to the application of 19 C.F.R. § 24.3a(c)(5) (payments must be allocated to interest before being applied to the principal), plaintiffs had not paid the entire amount of principal owing on all of the entries prior to the filing of the summons; and that since insufficient payment was submitted by plaintiffs to cover all moneys due on all the entries listed in the summons, a balance remained due on each of the entries at the time this action was commenced. However, for purposes of the court's jurisdiction, defendant has no objection to an equitable allocation of the duties already paid to certain entries covered by the summons, dismissal of the action as to three of the entries for which the duties paid are not sufficient, and preserving the court's jurisdiction in this case over the other twenty-three entries, as requested by plaintiffs.

The court finds that under all the facts and circumstances, the foregoing disposition is equitable to both parties and satisfies the statutory prerequisites to the court's jurisdiction. The total amount actually paid by plaintiffs prior to filing the summons – $28,711.08 – was more than sufficient to cover all duties and interest ($28,240.57) owing to Customs on 23 of the 26 entries listed on the summons. Following the *Eddietron* rationale, permitting the court to exercise its equitable power to reapportion plaintiff's partial payment of duties and interest with respect to all entries so as to permit full payment regarding certain entries, the court holds that with respect to 23 entries the payments made by plaintiffs should be deemed as payment in full. *See also United States v. Novelty Imports, Inc.,* 60 CCPA 131, C.A.D. 1096, 476 F.2d 1385 (1973); *Dynasty Footwear v. United States,* 4 CIT 196, 551 F. Supp. 1138 (1982). Relative to the three other entries for which full payment of duties and interest had not been made to Customs by the date of filing of the summons, the court lacks jurisdiction.[1]

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[1] Plaintiffs concede that with respect to entry No. 22800075156, the last entry listed on the summons, there has been no timely payment of the duties and interest owing, and thus that the action must be dismissed as to that entry for lack of jurisdiction.

This action is, at plaintiffs' request and without objection by defendant, severed and dismissed as to entries 22800074506, 22800074886 and 22800075156. As to the other twenty-three entries, defendant's motion to dismiss is denied.

Finally, the court finds plaintiffs' charges that its jurisdictional problems in this case may be ascribed to the bad faith on the part of Government counsel in not promptly filing an answer to the complaint by January 26, 1992 pointing out plaintiffs' jurisdictional impediment, and in seeking extensions of time (to which plaintiffs consented) for the purpose of delaying the present case beyond the statute of limitations for filing of a new action are disingenuous and unfounded – indeed, frivolous, irrelevant, and unsupported by a scintilla of substantiation. Plaintiffs' request for a preliminary evidentiary hearing for *the court* to interrogate under oath government counsel as to her motives in requesting patently routine extensions of time is denied.

In view of the foregoing, plaintiffs' attempt to invoke the doctrine of equitable estoppel against defendant is summarily rejected. *See also, United States v. Federal Insurance Co.*, 5 Fed. Cir. 16 (T), 805 F.2d 1012 (Fed. Cir. 1986), *cert. denied*, 481 U.S. 1048 (1987); *Eddietron*, 84 Cust. Ct. at 162, citing *Air-Sea Brokers, Inc. v. United States*, 66 CCPA 64, C.A.D. 1222, 596 F.2d 1008 (1979). Plaintiffs and their counsel cannot fairly put the blame on defendant's counsel for plaintiffs' lack of due diligence. Inexplicably, plaintiffs failed to pay the additional balance of duties and interest billed by Customs on October 13, 1991 until October 28, 1991 – four days after the filing of the summons which lack of due diligence was further compounded by the failure to institute a new action by filing a second summons prior the expiration of the 180 day statute of limitations (28 U.S.C. § 2636(a)) in January and March 1992.

NOTE: Pursuant to the court's Procedures for Publication of Opinion and Orders, the court's unpublished order entered on July 23, 1992 is being published by the Clerk's Office as Slip Op. 92–117 on July 24, 1992.

(Slip Op. 92–117)

KRAFT, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 89–11–00637

(Dated July 22, 1992)

CORRECTED JUDGMENT

RESTANI, *Judge:* In conformity with the foregoing Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED that the bear jars are properly classified under item 545.27, TSUS, free of duty and that the appropriate Customs offi-

cials shall reliquidate the subject entries and refund all duties paid thereon with interest from November 20, 1989;

IT IS FURTHER ORDERED that the classification of the bear jars results in their exception from the country of origin marking requirements set forth in 19 U.S.C. 1304 and that the appropriate Customs officials shall refund all marking duties assessed on the entries covered by Protest Numbers 0712–89–000475, 0712–89–000553, 0712–89–000477, and 0712–89–000474 plus interest from November 20, 1989;

IT IS FURTHER ORDERED that the value of the assist provided by plaintiff to the manufacturer of the bear jars is $22,267.82, that the addition to the appraised value of Entry Number 331–1340203–7 shall be reduced to reflect the correct value of the assist; and that, since the duty rate applicable to the value of the assist is free, the appropriate Customs officials shall refund all duties collected on the value of the assist plus interest from November 20, 1989.

(Slip Op. 92–118)

HOLMES PRODUCTS CORP. AND ESTEEM INDUSTRIES LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No 91–12–00906

[Remanded.]

(Dated July 24, 1992)

Dickstein, Shapiro & Morin, (*Arthur J. Lafave III*, *Douglas N. Jacobson*), for plaintiffs. *Stuart M. Gerson*, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jeffrey M. Telep*); *David Richardson*, Office of the Deputy Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION

RESTANI, *Judge:* Plaintiffs, Holmes Products Corporation ("Holmes") and Esteem Industries, Ltd. ("Esteem") challenge the final determination of the International Trade Administration, United States Department of Commerce ("ITA" or "Commerce") in *Oscillating Fans and Ceiling Fans From the Peoples's Republic of China,* 56 Fed. Reg. 55,271 (Dep't Comm. Oct. 25, 1991) (final determination of sales at less than fair value) ("Final Det."). ITA's determination is reversed and remanded.

FACTS

Esteem is a Hong Kong corporation that produces electric oscillating fans in the People's Republic of China ("PRC"); Holmes is a U.S. corpo-

ration that markets and imports fans made by Esteem. On October 31, 1990, an antidumping duty petition was filed with Commerce and the United States International Trade Commission ("ITC"), alleging material injury to the domestic industry due to less than fair value ("LTFV") sales of certain electric oscillating and ceiling fans from the PRC. The petition also alleged that the PRC is a nonmarket economy ("NME"), requiring resort to the NME provisions of the antidumping law. *See* 19 U.S.C. § 1677b(c) (1988).

On November 27, 1990, Commerce initiated an antidumping duty investigation. On December 17, 1990, ITC issued a preliminary affirmative injury determination, and on June 5, 1991, ITA issued a preliminary determination which found a *de minimis* dumping margin for Holmes and Esteem. *Oscillating Fans and Ceiling Fans From the People's Republic of China*, 56 Fed. Reg. 25,664 (Dep't Comm. June 5, 1991) (prelim. determination of sales at less than fair value).

In its questionnaire responses, Esteem had combined its own production information with that of Super Electric Motor Limited, an affiliated Hong Kong corporation that supplied all of Esteem's fan motors. During on-site verification, Holmes and Esteem were cooperative; however, due to an effort to sever relations with the plaintiffs, Super Electric was uncooperative, and ITA was unable to verify direct material costs for motors. Due to Super Electric's failure to cooperate, Holmes and Esteem conceded the need to use best information available ("BIA") to calculate some of Esteem's production costs. ITA chose not to reject Esteem's response and base its margin entirely on BIA because it found that Esteem "substantially complied" with its request for information. *Final Det.*, 56 Fed. Reg. at 55,279. Apparently, ITA concluded that Esteem was not controlling Super Electric's conduct. Holmes and Esteem proposed several alternatives for BIA, all of which were rejected by ITA. In the final determination, ITA used the Thai and PRC price quotations in the petition as BIA for raw material costs for motors, and the reported, unverified scrap figure as BIA for scrap costs. The result was an LTFV margin of 0.79% *ad valorem* for Holmes and Esteem.

After the disclosure conference, plaintiffs objected to ITA's methodology on the grounds that it resulted in double-counting of motor scrap and direct labor costs. Plaintiffs pointed out that the data submitted by Esteem included costs for raw materials, scrap and direct labor. When ITA substituted the finished motor price quotations in the petition for motor raw material costs, it deducted raw material costs from Esteem's figures, but did not deduct the motor scrap and direct labor costs. As these costs were almost certainly included in the price quotations, plaintiffs argued they were counted twice.

In a decision memorandum, ITA responded that it would not amend the final determination:

> At disclosure, we explained to respondent's counsel that we deducted Super Electric's direct material motor costs and added the motor prices contained in the petition because Super Electric failed

> to cooperate at verification. We made no attempt at the final determination to break-out the hypothetical motor labor and motor scrap costs associated with the prices reported in the petition. Under this methodology, the petition motor prices were used as BIA for Super Electric's direct material motor costs. * * * It is our opinion that the Department should not be in the position of attempting to adjust petitioner's information using respondent's information when it is not clear that the information is comparable. For instance, we do not know how Super Electric's motor labor costs compare to the motor labor costs associated with producing the motor in the petition.

Administrative Record, at 437 (*Memorandum from Richard W. Moreland to Francis J. Sailer*).[1] This appeal followed.

Discussion

Plaintiffs raise two arguments: (1) selection of unverified price quotations as BIA for Super Electric's direct material motor costs was error; and (2) ITA's failure to deduct Super Electric's motor labor and scrap costs from Esteem's reported factors of production resulted in double-counting.

1. Selection of Price Quotations as BIA:

In a case involving a nonmarket economy, ITA may determine foreign market value ("FMV") based on the value of the factors of production utilized in producing the merchandise, plus an amount for general expenses, profit and packing costs. 19 U.S.C. § 1677b(c)(1) (1988). The factors of production include labor hours, quantities of raw materials, and amounts of energy and other utilities. 19 U.S.C. § 1677b(c)(3) (1988). The factors of production are valued based on the prices or costs of such factors in one or more market economy countries at comparable levels of economic development, and with substantial production of comparable merchandise. 19 U.S.C. § 1677b(c)(4) (1988). Plaintiffs argue that the motor price quotations in the petition, which ITA used as a surrogate for the raw materials factor of production for motors, were inflated and unreliable, and that any of the alternatives proposed by plaintiffs would have been more probative of the raw material costs. Plaintiffs had proposed three alternatives: (i) labor hours verified at Super Electric (multiplied by labor cost per hour in the surrogate country, Pakistan) plus the value of the motor raw material inputs as provided by other respondents during the investigation; (ii) verified transfer prices charged by Super Electric on motors supplied to Esteem; or (iii) verified weighted-average cost of motors actually purchased by Esteem from market economy countries.

ITA has discretion as to the choice of BIA, but this discretion must be exercised reasonably. *See Timken Co. v. United States,* 11 CIT 786, 789, 673 F. Supp. 495, 501 (1987). ITA rejected use of information from other

[1] The memorandum also reveals a disagreement within Commerce as to whether it had committed an error and inadvertently double-counted motor labor and scrap costs.

respondents so as to avoid disclosure of business proprietary information. *See* 19 C.F.R. § 353.20(e) (1991). It declined to use the transfer price of fan motors supplied by Super Electric to Esteem because Super Electric and Esteem were related companies at the time of sale. It declined to use the weighted-average cost of motors purchased by Esteem from certain market economy countries because it believed this would have given Esteem too much control over the results of the investigation, a situation which ordinarily the BIA rule prevents. *See Pistachio Group of Assoc. of Food Indus. v. United States,* 11 CIT 668, 679, 671 F. Supp. 31, 40 (1987).

The first two choices were clearly reasonable. The third choice is difficult to understand in view of ITA's finding that Esteem substantially complied with the investigation. Defendant concedes that in selecting BIA, it need not draw inferences adverse to a substantially complying party. This is in contrast to the requirement of drawing adverse inferences where an uncooperative party is involved, as in *Pistachio Group.* As ITA had decided that Esteem had substantially complied and that it would use Esteem's data, it appears illogical to reject other data provided by Esteem solely on the basis that this would give Esteem too much control. Furthermore, use of average data for substantially complying parties has been approved in other contexts. See *Asociacion Colombiana de Exportadores de Flores v. United States,* 13 CIT 13, 16–17, 704 F. Supp. 1114, 1117–18 (1989). Perhaps, as hinted by counsel at oral argument, this is a hybrid case, in which the normal substantial compliance rules do not apply. If so, this was not explained. ITA should consider its decision on this issue and explain the result.

Assuming there is a proper reason for rejecting the weighted-average cost of motors and preferring petition prices, ITA's choice of the petition price quotations as BIA may not be improper. Both the statute and the regulations contemplate use as BIA of information submitted in support of the petition, (19 U.S.C. § 1677e(b) (1988); 19 C.F.R. § 353.37(b) (1991)), and plaintiffs have pointed to no record evidence that leads the court to conclude that the petition price quotations were unreliable, or in themselves led to inaccurate dumping margins. *See also Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990) (statutory purpose is "determining current margins as accurately as possible"); *N.A.R.. S.p.A. v. United States,* 15 CIT ____, ____, 741 F. Supp. 936, 942 (1990) (use of BIA upheld if supported by substantial evidence and otherwise in accordance with law).

2. Motor Labor and Scrap Costs:

Assuming the weighted-average cost of motors is not accepted, plaintiffs argue that the manner in which ITA used the price surrogate was improper.

Plaintiffs argue that the motor prices reported in the petition were prices for finished motors, and therefore included all material and labor costs. Thus, plaintiffs contend, ITA's failure to deduct the motor labor and scrap costs from the final FMV resulted in double-counting of these

expenses. The government concedes that double-counting occurred; it argues, however, that it was forced to resort to BIA for certain factors of production, that it had discretion to choose any reasonable information as a substitute for these factors of production, and that it intended to substitute an entire motor price for the raw material costs. Therefore, it states that no inadvertent "error" was made.

It is conceded that ITA could have used BIA for all motor costs. Instead, it chose to use BIA only for those factors of production that it was unable to verify; that is, the raw material and scrap costs. When it adopted this methodology, however, and substituted the full motor price quotations for raw material costs only, reason and logic dictated that it make an appropriate adjustment so as to avoid double counting, if possible. In this case ITA had the information to adjust for labor and, to some extent, scrap costs.[2] If ITA were truly concerned about adjusting petitioner's prices with respondent's data, even verified data, it could simply have substituted a motor price for those factors of production included in the motor price, without adding back factors already included in the overall motor price.

At oral argument, defendant insisted that the result in this case occurred because of its attempt to use a pure factor of production approach. Defendant, however, does not argue that when it was forced to utilize BIA it was prohibited from substituting motor prices for all of the relevant motor factors of production or that, if it chose to use separate factors of production for the motors, the statute prevented it from making deductions to avoid double-counting. As a respondent, and particularly as a substantially complying one, Esteem was entitled to a reasonable methodology for calculating FMV.

As has been stated time and time again, fair (apples to apples) comparison is the goal of price comparisons in the antidumping law. *American Permac, Inc. v. United States,* 16 CIT ____, ____, 783 F. Supp. 1421, 1423 (1992). Double-counting is to be avoided. *See generally, Floral Trade Council v. United States,* 14 CIT ____, Slip Op. 91–90, at 22–23 (Sept. 27, 1991). On remand, ITA should reconsider its approach, and adopt a methodology that does not result in double-counting costs, insofar as it is reasonably avoidable. This is remanded for thirty days.

[2] Scrap costs were not verified. ITA may have discretion to treat these costs differently from labor costs. If it chooses to do so, it should make its choice clear and provide an explanation.

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